



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.55 OF 2014

(From original conviction and sentence in Criminal Case No.1068 of 2013 of the SRM'S Court at Kilgoris delivered on 2nd July 2014 by Hon. M. Munyendo – RM)

P L.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. The Appellant herein, **PL** was on 11th December, 2013 charged with one main count and an alternative count as follows:

On the main count, he was charged with **Defilement of a girl contrary to Section on 8th January** as read with **Section 8(2)** of the **Sexual Offences Act No.3 of 2006**. The particulars were that on 21st November, 203 in Transmara West District of Narok County, caused his penis to penetrate the vagina of **S. C (name withheld)** A girl aged 10 years.

The alternative charge was that of **Indecent act with a child** contrary to **Section 11(1) of the Sexual Offences Act**. The particulars were that on 21st November 2013 in Transmara West District of Narok County unlawfully and indecently assaulted **S. C. (name withheld)** a girl aged 10 years by touching her private parts namely vagina.

2. The Appellant was tried, convicted and sentenced to life imprisonment on the main count.

3. He now appeals against both the conviction and sentence on the 9 grounds set out in the Petition of Appeal filed on 15th July 2014 as follows:

1. The Learned Trial Magistrate erred in Law and Fact when the same failed to appreciate that the ingredients of the offence of defilement contrary to Section 8(1) & 8(2) of the Sexual Offences Act No.3 of 2006, the basis of conviction and sentence were never proved.

2. The Learned Trial Magistrate erred in Law and fact by failing to consider the evidence of the complainant with circumspection, taking into account of the medical evidence adduced and the Defence and evidence of the Accused and witnesses.

3. The Learned Trial Magistrate erred in Law and in fact by failing to appreciate that

the charge sheet as framed was defective thereby prejudicing the accused.

4. The Learned Trial Magistrate erred in Law and in fact by failing to appreciate that the charge sheet as framed was defective thereby prejudicing the accused.

5. That the Learned Trial Magistrate erred in Law and in fact in misconstruing the principles applicable in respect to admissibility of the evidence of a child witness.

6. The trial Magistrate erred in Law and in fact in convicting and sentencing the accused person without any basis.

7. That the Learned Trial Magistrate erred in Law and in fact in proceeding in a language the accused does not understand.

8. The Learned Trial Magistrate erred in Law and in fact when the same failed to explain to the accused the right of being represented by an advocate or assigning an advocate to represent the same in light of the gravity of the charges facing the same.

9. That the Learned Trial Magistrate erred in Law by engaging into speculation as a basis of conviction and sentence against the Appellant.

4. At the hearing of the appeal, the Appellant was represented by Mr. O. M. Otieno advocate who consolidated all the 9 grounds of appeal and argued them together as follows:

Mr. Otieno submitted that the Appellant was convicted in the absence of adequate evidence to support the conviction as the prosecution's case was not proved to the required standards. According to Mr. Otieno, the prosecution's case was riddled with a litany of errors, which if analyzed critically would render the conviction unsafe.

5. Mr. Otieno's first line of attack was the language used during the trial which he submitted, was not understood by the Appellant and this contravened the provision of **Article 50 of the Constitution** by denying the Appellant his right to a fair trial.

6. Secondly, Mr. Otieno took issue with the medical evidence produced through the P3 form which he submitted was not clear on the date of the examination of the complainant and that the doctor who authored the said report was not called to testify in court thereby making the medical evidence suspect.

7. According to Mr. Otieno, the fact that no spermatozoa was found on the victim who was medically examined a day after the sexual assault was further proof that the prosecution's case was doubtful.

8. Thirdly, the Appellant's counsel submitted that the Appellant was not positively identified by the complainant who simply referred to him as "**P**" and that the court should have taken judicial notice that the name Peter could have referred to anyone else other than the Appellant.

9. The Appellant contended that the court should have noted that the Appellant and PW2 were husband and wife who were at loggerheads and as such PW2 could have ganged up with PW3 to implicate the Appellant in such a heinous crime in order to revenge following their marital disputes.

10. Lastly, Mr. Otieno submitted that the Appellant's rights under **Article 50 (1) (a) and (h)** were breached thereby leading to an unfair trial as the Appellant was not accorded legal representation by the court even though he was facing a serious offence punishable by life imprisonment upon the court making a guilty verdict.

11. Miss Boyon, counsel for the State, opposed the appeal and submitted the Appellant fully understood the Kiswahili language used by the court, right from the beginning when he chose to take plea and answer to the charges in Kiswahili. According to Miss. Boyon, at no time during the trial did the Appellant

complain of being unable to follow the proceedings as the Appellant participated fully in the case by cross-examining the prosecution witnesses.

12. Miss Boyon submitted that the medical evidence tendered before the lower court was sufficient to prove the offence of defilement as PW5 confirmed that there was penetration and proceeded to produce the P.3 form as an exhibit.

13. On identification of the Appellant by the complainant, Miss. Boyon submitted that the same was positive and proper since the Appellant was the step father of the Complainant by virtue of having been married to PW2, the Complainant's mother, and as such, the only P that the complainant was referring to in her testimony was the Appellant.

14. Miss Boyon added that the Appellant's allegation that PW2 teamed up with PW3 to implicate him in the heinous crime as a way of revenging on him due to their domestic squabbles was far-fetched and a diversionary tactic used by the Appellant who himself decided to revenge on the wife (PW2) by defiling her daughter (PW1).

15. On the Appellant's entitlement to legal representation under Article 50 of the Constitution, Miss Boyon submitted that the Appellant had a right to appoint a legal counsel to represent him in the case, he chose not to do and at no time did he indicate that he wanted legal representation. Miss Boyon concluded her submissions by stating that the evidence of the prosecution witnesses was flawless and full proof. She prayed for the dismissal of the appeal.

16. This being a first appeal, it is my duty to analyze the evidence afresh and re-evaluate the same in order to draw my own independent conclusion on whether or not to uphold the conviction while bearing in mind the fact that I neither saw nor heard the witnesses testify. This position was stated in the case of **Okeno vs Rep. [1982-88] KLR 1136**. In a more recent decision, the Court of Appeal in **Collins Akoyo Okemba & 2 others vs Republic [2014] eKLR** emphasized the court's duty as follows:

“It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision.”

17. The prosecution led evidence as follows:

PW1, S.C (name withheld) a girl aged 11 years testified that on the material night (**21st November 2013**) she was in the house of another woman when at about 11.00 p.m., the Appellant, whom she referred to as Peter, came and asked her to go to sleep in their house (**P house**) since her mother was not there. PW1 went to the house and slept, but soon thereafter, the Appellant came into the house and defiled her the whole night till morning. The following morning, PW2, the mother of PW1 came and upon learning what had transpired, reported the matter to the police and took PW1 to hospital.

18. PW2, S.C (name withheld) was the mother of PW1 who narrated how on 19th November 2013 she had ran away from her matrimonial home due to the differences that she had with her husband the Appellant only to return home on 22nd November 2013 and find that PW1 had been defiled by the Appellant the previous night. She testified that she found PW1 walking with a strange gait and upon checking her private parts found it bloody with a white discharge. She then took the steps of reporting the incident to the police and took PW1 to hospital.

19. PW3, G S testified that on 21st November 2013 at about 11.00 p.m., she was at the home of the Appellant where she worked as a casual labourer and was inside a house she had been given by the Appellant to live in which house was about 30 meters from the Appellant's house. She testified that on the fateful night she was in the said house with PW1 when the Appellant came and asked PW1 to go and light fire and make food for him in his house. PW3 responded to the Appellant's request by informing him that the fire had already been lit but there was no food, and instead PW3 offered the Appellant some food which he ate. PW1 would sleep in the same house with PW3.

Despite having been given food to eat, the Appellant still insisted on telling PW1 to go and light a fire in his house. PW1 left and the Appellant followed her soon thereafter. It was upon realizing that PW1 took a little long to come back to her house that PW3 got curious and went out to check what could have happened to her that she heard PW1 crying from the Appellant's house while saying "**leave me, leave me.**" PW3 became afraid and ran away and spent the night in the Maize plantation. The following morning she noticed that PW1 was in a lot of pain and was unable to sit straight or walk properly. She later informed PW2 and the Appellant's sister in-law of what had transpired.

20. PW4, PC.WILLIS OCHIENG was the police officer who received the report about the defilement case, conducted the investigations, issued the P.3 form, arrested the Appellant and charged him with the offence of defilement.

21. PW5, DR. NICHOLAS MITEI was the medical doctor in charge of Lolgorian Sub-District Hospital who filled the P.3 form in respect to the complainant following her defilement. He testified that upon examining the Complainant's genitals, he noted that the labia majora was swollen while the labia minora was inflamed. The doctor observed that there was no spermatozoa. He testified that the Complainant was treated on 23rd November 2013 but the P.3 form filled on 20th January 2014. The doctor produced the P.3 form filled on 20th January 2014 as an exhibit in court. Upon being cross-examined by the court, PW5 confirmed that there was penetration.

22. PW6, DR. MISOI SAMUEL did an age assessment on the complainant and established her age to be 10 years. He produced an age assessment report as exhibit 2.

23. The Appellant gave a sworn statement and called 2 witnesses. In his defence, in which he stated that on 21st November 2013, he went home and arrived at 7.00 p.m., only to find his wife missing. He confirmed that he found PW1 and PW3 at home and on enquiring about his wife's whereabouts' they informed him that she had gone to a neighbour's home. He stated he ate and slept and on the following day looked for his wife and they talked and reconciled only to learn later that PW3 had made the allegations of defilement against him. He denied any involvement in any wrong-doing and instead testified that his wife had framed him up because he had not paid dowry to her parents. Upon being cross-examined by the prosecutor, the Appellant confirmed that PW1 was not his biological daughter but he had one other child with PW2.

24. DW2, J N testified that on 21st November 2013, he spent the night at the Appellant's mother's house and on the morning that followed, he saw PW1 and that she was well and playing as usual. Upon being cross-examined by the prosecution, DW2 confirmed that he did not sleep in the same house with the Appellant on the material night and therefore he could not tell what had transpired during the night.

25. DW3, A L alias K is the Appellant's mother. She testified that she saw the Complainant playing with other children on 22nd November 2013 and according to DW3, the Complainant appeared very okay as if she had been defiled, she could have been very sick. On cross-examination, DW3 confirmed that she could not tell if the Appellant defiled the complainant because they lived in a separate house about 50 meters from her house.

26. I have carefully evaluated the evidence adduced by both the prosecution and the defence together with submissions from both sides. This court is first and foremost tasked with the duty of determining whether or not the complainant was defiled and if so, if the Appellant was responsible for the offence.

27. From the evidence of PW1, she was very clear in her mind that she was defiled by the Appellant which defilement went on for the whole night. The Appellant was the Complainant's own step-father and there is therefore no way she could have confused him for someone else. The circumstances preceding the sexual attack on the complainant were well explained by PW3 who narrated how on the fateful night, the Appellant insisted on asking PW1 to go and light a fire for him in his house even after PW3 had resisted those overtures by not only telling the Appellant that there was no need for making such a request, but that there was also no food to be cooked by the Complainant at that time of the night whereupon PW3

offered to give the Appellant some food to eat.

The evidence of PW1 was corroborated by the evidence of PW3 who testified that no sooner had the Appellant left her house for his house where the complainant was, than she heard PW1 scream and cry “leave me – leave me.” PW3 was certain that the Appellant was sexually assaulting the Complainant and this made her run for cover in a Maize farm. The evidence of PW1 and PW3 leaves no doubt in my mind that PW1 was defiled.

28. On the language used by the court, I note that trial was conducted in Kiswahili after the Appellant himself took his plea by answering to the charges in Kiswahili even though at that time, the charges were read to him in Maasai language. The Appellant and his witnesses testified using Kiswahili language and therefore, I find his claim in this appeal that his rights to fair trial under **Article 50** were breached because he never understood the language used by the trial court, to hold no water.

29. I also find that the medical evidence adduced during the trial was full proof and did not have any gaps. PW5 was categorical that the Complainant was treated on 23rd November 2013 and the P.3 form filled on 20th January 2014. The medical evidence confirmed that there was penetration and injury to the Complainant’s genitalia. I find the above to be sufficient proof of defilement and therefore, the mere fact that no spermatozoa were seen at the time of the medical examination cannot obliterate the fact that the complainant was sexually assaulted.

30. In any event, the offence of defilement is against penetration of a minor and penetration does not always necessarily end in release of sperms into the victim. Many times, the attacker does not fully complete the sexual act during commission of the offence and this is why the provisions of **Section 8(1)** as read with **Section 8(2) of Sexual Offences Act No.3 of 2006** requires proof of penetration and not the availing of spermatozoa. The penetration need not be deep inside and the offence is proved as long as there is penetration even only on the surface.

31. I find the Appellant’s submission that he was set up/fixed by PW2 in conjunction with PW3 who instigated his arrest and arraignment in court on the charges of defilement of PW1 as a means of executing revenge following his failure to pay dowry to PW2’s parents quite incredible.

32. I note that PW2 was the wife of the Appellant with whom they even had another child apart from PW1 who was his step child. There was no evidence led either by the prosecution witnesses during cross-examination or by the defence witnesses to show that PW2 and PW3 were on a revenge mission against the Appellant. I find it hard to believe that PW2 could have cooked up evidence and coached all the witnesses including expert witnesses, to wit, the medical doctors (PW5 and PW6) to give false evidence against the Appellant.

33. On the Appellant’s right to legal representation, **Article 50** of the **Constitution** provides for legal representation as follows;

1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

2. Every accused person has the right to a fair trial, which includes the right:

a. To be presumed innocent until the contrary is proved;

b. To be informed of the charge, with sufficient detail to answer it;

c. To have adequate time and facilities to prepare a defence;

d. To a public trial before a court established under this Constitution;

- e. To have the trial begin and conclude without unreasonable delay;
- f. To be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
- g. To choose, and be represented by, an advocate, and to be informed of this right promptly;
- h. To have an advocate assigned to the accused person by the State and at State expense, it substantial injustice would otherwise result, and to be informed of this right promptly;
- i. To remain silent, and not to testify during the proceedings;
- j. To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
- k. To adduce and challenge evidence;
- l. To refuse to give self-incriminating evidence;
- n. To have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;.....”

34. The court of Appeal sitting in Malindi had occasion to deal with the issue of legal representation in the case of KARISA CHENGO, JEFFERSON KALAMA KENGHAK KITSAQ CHARO NGATI vs REPUBLIC [2015] KLR when it quoted the case of DAVID MACHARIA NJOROGE vs REPUBLIC [2011] eKLR where it was held:

“State funded legal representation is a right in certain instances Article 50 (1) provides that an accused shall have an advocate assigned to him by the State, at the States expense, if substantial injustice would otherwise result. Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal and is mandatory.

We are of the considered view that in addition to situations where ‘substantial injustice would otherwise result,’ persons accused of capital offences where the penalty is loss of life have the right to legal representation at State expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a retrial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly, every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.”

35. In the case of KARISA CHENGO, JEFFERSON KALAMA KENGHA & ITSAO CHARO NGATI vs REPUBLIC (*Supra*) the Court of Appeal added as follows:

“Substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.”

From the above quoted cases, it would appear that for an accused to qualify for legal representation under **Article 50**, it must be evident that such a person charged with a capital offence cannot afford legal representation thereby compromising the trial in one way or another. In the instant case, the Appellant

was charged with the offence of defilement that attracts a penalty of life imprisonment upon conviction and not death penalty. Under those circumstances, I find that the Appellant's argument that he was entitled to legal representation as, envisaged under **Article 50** of the **Constitution** is not sustainable.

36. In conclusion, I find that the evidence tendered by the prosecution was overwhelming and was not controverted by the defence. I also note that none of the Appellant's witnesses was able to give an account or attest to the Appellant's actions on the night of 21st November 2013 when the defilement took place.

37. The upshot of foregoing is that I find that the appeal lacks merit and is hereby dismissed.

Dated, signed and delivered in open court at Kisii this 3rd day of November, 2015

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Majale for the State
- O. M. Otieno for the Appellant
- The Appellant
- Mr. Ogega: court clerk